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ABSTRACT

The applicability of "in loco parentis" and the issue of commercial speech (e.g. sales pitches and advertising) on campus are discussed. While in previous years the principle of in loco parentis allowed colleges to dicate the behavior of its students, colleges must now take reasonable steps to guarantee the physical safety of students. This doctrine was weakened by the arrival on campus of veterans and by the lowering of the age of majority to 18. In loco parentis is still legally viable at any college that elects to stand in the place of a parent whose minor child matriculates there. At more mainstream schools, plaintiffs are using this doctrine to try to hold the college liable for injuries they have suffered. The issue of commercial speech on campus also centers on responsibility of the college to protect students. The focus here is the public sector and the protections cited in the First Amendment, including those that guarantee free speech. It is emphasized that commercial speech is protected on campus as well as off. Limits by colleges must clearly serve the legitimate educational interests of preventing disruption, protecting the safety and security of dormitory students, and protecting students from commercial exploitation. Specific court cases are cited as illustration. (SW)

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AND

COMMERCIAL SPEECH ON CAMPUS

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In Loco Parentis Revisited
and
Commercial Speech on Campus

Walter C. Hobbs*

IN LOCO PARENTIS REVISITED

The view is widely shared among both student personnel administrators and academic lawyers that "in loco parentis" is dead. That view is incorrect. Numerous church-affiliated colleges, for example, still stand in the place of the parent vis-a-vis the minor student,[1] and no court in the land has expressly overturned the doctrine.

On the other hand, we are all aware that, generally speaking, the principle of in loco parentis is no longer operative in most institutions of higher education. The Third Circuit Court of Appeals discussed the matter in Bradshaw v. Rawlings, 612 F.2d 135 (1979), cert. denied, 446 U.S. 909 (1980), and concluded that "[w]hatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. . . . At one time, exercising their rights and duties in loco parentis, colleges were able to impose strict regulations. But today students [have]

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[1]Arland B. Rees, In Loco Parentis and Student Discipline in ~~Church-Affiliated Colleges~~ Private Higher Education, unpubl. doctoral dissertation, SUNY/Buffalo, 1979.

demanded and received satisfaction of their interest in self-assertion in both physical and mental activities. . . ."[2]

Probably the most potent social development leading ultimately to the weakening of the doctrine in practice was the arrival on campus of a host of seasoned, mature, educationally serious -- and independent -- military veterans. The counterpart legal development, in turn, was the lowering of the age of majority to eighteen throughout the United States. The typical college student was no longer a minor at law, accountable to a parent or a surrogate; the student was instead an adult, both at law and in everyday life.

It's important, however, not to allow generalizations at the level of praxis become imprecise formulations of law. Not only is in loco parentis still legally viable at any institution which elects to stand in the place of a parent whose minor child matriculates there, it is also reappearing in revised form in case law arising from more mainstream colleges and universities. Without using the phrase (now tainted by the premature reports of its demise), plaintiffs in the latter institutions are nonetheless resorting to its logic in attempts to hold those institutions liable for injuries they have suffered. My colleague, Sanford Levine (University Counsel and Vice Chancellor for Legal Affairs, State University of New York), speaks of such arguments and the responses they elicit from the courts as "in loco parentis revisited."[3]

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[2] 612 F.2d at 138-140.

[3] Sanford H. Levine, "In Loco Parentis Revisited," a paper presented to the Institute for Educational Management, Harvard University, November 1986.

Bradshaw v. Rawlings, cited above, is a case in point. Bradshaw was an eighteen-year-old student at Delaware Valley College, who was severely injured while a backseat passenger in an automobile driven by Rawlings, a fellow student who was intoxicated at the time. The two were returning from the Sophomore Class picnic, an annual event of the College held off-campus. Although College regulations prohibited possession or consumption of alcohol at College-sponsored activities, flyers announcing the picnic and featuring drawings of beer mugs had been mimeographed by the College's duplicating facility and were prominently displayed on campus. Indeed, the Sophomore Class Faculty Advisor participated in planning the event and even co-signed a check for class funds to purchase the beer. He did not, however, attend the picnic, nor did he recruit a colleague to do so in his place.

The plaintiff sued not only the defendant driver but the College as well, on the theory that the College had breached its duty to him to exercise due care to prevent an unreasonable risk of harm to sophomores who attend a class function. The College defended on grounds that it was not negligent (that is, it had not failed to exercise the care expected of a reasonable person) because it was powerless to control the habits of college sophomores in regard to drinking beer. The trial court held against the College, which took an appeal to the Circuit Court. The latter Court sided instead with the College, and the U.S. Supreme Court declined to review the case. The Circuit Court held that because "the students have reached the age of majority and are capable of protecting their own self interests," the College does not retain the "traditional custodial responsibilities [of an institution whose] stu-

dents are all minors, as in an elementary school, or mostly minors, as in a high school."[4]

Bradshaw, however, did not deter other litigants from pressing similar claims and, unlike Bradshaw, they have prevailed. A Massachusetts student sought damages for injuries suffered when she was raped on campus, and the court held inter alia that simply because a college need not police the morals of its resident students does not entitle it to abandon any effort to insure their physical safety; to the contrary, parents and students have a reasonable expectation that care will be exercised by the college to protect residents from foreseeable harm, Mullins v. Pine Manor College, 449 N.E.2d 331 (1983). The Supreme Court of California held in 1984 that a community college district had a duty to exercise foreseeable care to protect students from reasonably foreseeable assaults on campus, Peterson v. San Francisco Community College District, 685 P.2d 1193. And that same year, New York's highest court held that when the State operates college housing, it acts inter alia in a capacity as landlord, and is subject thereby to the same principles of negligence as is a private landlord. In what is probably the most tragic instance in this line of cases, a student at SUNY/College at Buffalo was murdered by another student who had been admitted to the College upon conditional release from a State prison. Though the Court held expressly that recovery for damages in a civil suit against the State for negligence would not be granted on the theory of in loco parentis, the Court did observe that "[t]hat is not to say that a college is [relieved] of all responsibility for the safety of its students. . . . A

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[4] 612 F.2d at 140.

college . . . obviously is expected to provide, in addition to an intellectual climate, a physical environment harmonious with the purposes of an institution of higher learning," Eiseman v. State of New York, 109 AD2d at 52 (1985).

The revisitation of "in loco parentis" by both claimants and courts, it appears, is the old doctrine turned upside down. Earlier, under that principle the institution could, if it wished, dictate the behavior of its students; now it must, by operation of law, take all reasonable steps to guarantee the physical safety of those students.

COMMERCIAL SPEECH ON CAMPUS

Although it may not strike one immediately, there is a conceptual connection between this topic, "Commercial Speech on Campus," and the first, "In Loco Parentis Revisited." Here as before the issue centers upon the question, "What responsibility does an institution have to protect its students?," in this context, to protect them from shysters. But in addition, the question also arises, "What powers can the institution exercise in affording whatever protection it may or must afford?"

Initially we're speaking only of publicly owned and/or operated colleges and universities.[5] The several protections cited in the First Amendment to the United States Constitution, including those which guarantee "free speech" (or, to use the more expansive term, "free expression") do not fold private institutions within their reach. The protec-

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[5]Including the few privately sponsored institutions which, under the "state action" doctrine, are treated as publicly owned and/or operated for purpose of constitutional analysis.

tion operates negatively, not affirmatively. That is to say, it prohibits its government from taking action, it does not compel private parties to act a given way. Consequently, public colleges and universities may not preclude free expression without running the risk of violating the constitutional constraints placed upon them. But private institutions face no such constraints, nor are they constitutionally required to permit "free expression" within their hallowed walls. If they wish to prohibit given discussions, lectures, music, garb, posters, coifs etc. on the basis of the content of such expression -- including sales pitches and advertising, a/k/a "commercial speech" -- there is no constitutional impediment to their so doing. There certainly is a barrier, however, to the implementation of such restrictions on the state university campus.

The subsidiary question arises, therefore, what "speech" is protectable, what may be freely expressed? Is everything, anything, fair game? Certainly not; a moment's reflection discloses that not everything goes -- pornography comes immediately to mind. Where then is the line drawn?

One such line distinguishes "pure" speech from "commercial" speech. The latter, an advertisement in a local newspaper for example, is not pushed out from under the protective umbrella of the First Amendment, but neither is it accorded the same high status of the former such as a news item in that same paper.

Yet it must be emphasized: commercial speech <u>is</u> protected -- on campus as well as off. But then again, must that be taken to mean that one is free to express oneself commercially anywhere on campus? No, not at all; persons acquainted with First Amendment law know well that con-

siderations of "time, place, and manner" may lawfully preclude speech that would otherwise be permissible, Grayned v. City of Rockford, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972). Where then, would such restrictions apply on campus, and what sort of "speech" would they limit?

Those are the issues presented in two actions brought by American Future Systems, Inc. against respectively The Pennsylvania State University, 752 F.2d 854 (1984), and SUNY College at Cortland, 565 F.Supp. 754 (1983). American Future is a corporation that sells cookware, china, crystal et al. to college students through group demonstrations a la "the Tupperware party." Penn State and Cortland both barred American Future from engaging in such sales in the two campuses' dormitories, and the corporation together with students on each campus through whom the sales were conducted challenged the constitutionality of the institutions' regulations in separate suits. The Penn State case reached the Third Circuit Court of Appeals, and the Cortland case is on appeal from the trial level to the Second Circuit. Thus far, each court has held that (a) the "speech" in question is commercial, and therefore protectable, but (b) consummation of sales in dormitory rooms (Cortland) or residence halls (Penn State) can be regulated by the institutions. American Future had argued that because the content of its speech was educational, social, and cultural as well as commercial, it should be afforded the full protections accorded "pure" speech, but both courts held that even accepting American Futures' descriptions, the possibility of some noncommercial value in otherwise commercial speech does not transform the latter into pure speech. On the other hand, if the institu-

tions wish to regulate the time, place and manner in which the commercial speech is to be undertaken, they must draw their regulations narrowly. A blanket prohibition on such speech is overbroad, and will not survive constitutional scrutiny. Rather the limits must clearly be no more excessive than is necessary to serve the legitimate educational interests of preventing disruption, protecting the safety and security of dormitory residents, and protecting students from commercial exploitation.[6]

What would have been the outcome had the same issues arisen in a private college or university? As stated above, the First Amendment would be irrelevant. Conceivably, the quasi-contractual relationship of the institution with its students, manifested in policy handbooks, residence halls contracts and the like would dictate the result. There is another source of law, however, which might also operate to affect the decision, namely, the constitution of the State in which the university is found. An indicative instance of such a possibility arose in State v. Schmid, N.J., 423 A.2d 615 (1980). Mr. Schmid was found guilty of trespass on the campus of Princeton University where he had sold as well as distributed political materials dealing with a mayoral campaign in Newark. He was not a student at the institution, nor was his Party a university-affiliated or campus-based organization. After extensive analysis of several arguments that might have drawn the case within the ambit of the First Amendment (but did not), the Court held that New Jersey's Constitution is a "wellspring of individual rights and liber-

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[6]The Cortland Court held that although the University did not function in loco parentis, it could promote consumer protection within its confines.

ties [and] may be directly enforceable, its protections not dependent even upon implementing legislation."[7] Mr. Schmid's conviction was reversed.

In short, commercial speech may be a weaker candidate for protection under the First Amendment to the U.S. Constitution than is "pure" speech, but the college administrator who imagines that he/she can thus brush it lightly aside may be in for a rude awakening. Not only must the limits which an institution places on such speech be carefully crafted under that Amendment to impose no greater restrictions than are necessary to accomplish an educational purpose, but in addition there are other legal avenues which a disappointed commercial speaker in even the private institution may take to have his/her say on campus.

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[7] State v. Schmid, N.J., 423 A.2d at 627.